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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE BOARD OF TRUSTEES, in their	)	Case No.	10-5204 JL
capacities as Trustees of the LABORERS	)		
HEALTH AND WELFARE TRUST FUND	)		
FOR NORTHERN CALIFORNIA; LABORERS	)		
VACATION-HOLIDAY TRUST FUND FOR	)		
NORTHERN CALIFORNIA; LABORERS	)		
PENSION TRUST FUND FOR NORTHERN	)		
CALIFORNIA; and LABORERS TRAINING	)	NOTICE OF MOTION AND MOTION	
AND RETRAINING TRUST FUND FOR	)	FOR DEFAULT JUDGMENT	
NORTHERN CALIFORNIA,	)		
	)		
Plaintiffs,	)	Date:	May 13, 2011
	)	Time:	9:00 a.m.
v.	)	Courtroom:	10, 19 th Floor
	)		
SILVESTRI CONSTRUCTION, INC., A	)	Honorable Susan Illston	
California Corporation,	)		
	)		
Defendant.	)		

I. NOTICE

PLEASE TAKE NOTICE that on May 13, 2011, at 9:00 a.m. in Courtroom 10, Floor 19, in the above captioned Court, Plaintiffs, The Board of Trustees, in their capacities as Trustees of the Laborers Health and Welfare Trust Fund for Northern California; Laborers Vacation-Holiday Trust Fund for Northern California; Laborers Pension Trust Fund for Northern California; and Laborers Training and Retraining Trust Fund for Northern California (hereinafter "Trust Funds" or

1 “Plaintiffs”) will move this Court for an order granting entry of a default judgment for unpaid
2 contributions, interest thereon, and attorneys’ fees and costs, and for an order compelling
3 Defendant Silvestri Construction, Inc., a California Corporation, (hereinafter “Defendant”) to
4 forthwith submit to an audit of their books, records, papers and reports as required by the
5 Agreements to which they are bound. The motion will be brought pursuant to Rule 55(b)(2) of the
6 Federal Rules of Civil Procedures (F.R.C.P.), and will be based on the following grounds. The
7 Clerk entered default against the Defendant on December 30, 2010. The Complaint was served on
8 Defendant on November 29, 2010, for which proofs of service were filed before this Court with the
9 Summons on December 14, 2010. Defendant failed to respond to the complaint.

10 The Trust Funds are therefore entitled to entry of default judgment against Defendant under
11 F.R.C.P. 55(b)(2) by the Court. This Notice and Motion are supported by the Memorandum Points
12 and Authorities, Declaration of John Hagan, Declaration of Concepción E. Lozano-Batista and the
13 [Proposed] Judgment, all of which are filed concurrently herewith.

14 **II. MOTION**

15 Plaintiffs, by and through their undersigned counsel, hereby apply, pursuant to Rule
16 55(b)(2) of the Federal Rules of Civil Procedure, for judgment by default in their favor and against
17 Defendant for (1) an Order directing Defendant to pay delinquent contributions in the amount of
18 \$24,168.80, and liquidated damages and interest in the amount of \$14,421.91; (2) an Order
19 directing Defendant to submit to an audit of their books and records as required by the agreement
20 to which they are bound; (3) that upon the completion of the audit, contributions due and owing in
21 an amount to be determined by said audit and interest thereon; (4) reasonable attorneys’ fees, and
22 Plaintiffs’ costs of suit; (5) for an order directing and permanently enjoining Defendant to timely
23 submit all required monthly contribution reports and contributions due and owing by Defendant;
24 (6) for this Court to retain jurisdiction; and (7) for such and further relief as to this Court seems
25 just and proper.

26 The grounds for this application are as follows:

- 27 1. The Clerk of the Court entered Default on December 30, 2010, against Defendant,

1 for failure to answer or otherwise respond to the complaint herein; and

2 2. Plaintiffs are entitled to the relief sought herein.

3 **III. POINTS AND AUTHORITIES**

4 **A. INTRODUCTION AND RELEVANT FACTS.**

5 Defendant Silvestri Construction, Inc. executed a Memorandum Agreement with the
6 Northern California District Council of Laborers, which incorporates the terms of the Laborers
7 Master Agreement and the Trust Agreements that govern each of the Trust Funds. The Collective
8 Bargaining Agreement known as the Master Agreement incorporates the terms of the Trust
9 Agreements which govern each of the Trust Funds (hereinafter the Master Agreement and Trust
10 Fund Agreements when collectively referred to will be called the “Agreements”). Declaration of
11 John Hagan in Support of Motion for Default Judgment (“Hagan Decl.”) ¶¶4-6, Exhibits A - C.

12 On October 22, 2008, Defendant also signed a Participation Agreement with Laborers
13 Union Local 67. The Participation Agreement also independently incorporates the terms and
14 conditions of the Laborers Health and Welfare Trust Agreement (hereinafter the Master
15 Agreement, Participation and Trust Fund Agreements when collectively referred to will be called
16 the “Agreements”). Hagan Decl. ¶7.

17 The Agreements require signatory employers to make timely contributions into the above-
18 captioned Trust Funds at a specified rate for each hour worked by, or paid to, all employees
19 performing work covered under the Master Agreement, or for monthly amounts due for employees
20 under the Participation Agreement. The Agreements require employers to report the number of
21 covered hours worked by, or paid to, each of their employees performing covered work by
22 submitting Employer Reports of Contributions, along with the amounts owed pursuant to the
23 Reports, to the Laborers Trust Funds. Hagan Decl. ¶¶10-11.

24 The Agreements also provide for an audit of the books and records of signatory employers
25 so that the Laborers Trust Funds may determine if the employer is making full and prompt
26 payment of required contributions. Section 7 of the Master Agreement provides that “Each
27 Individual Employer, upon request of any Trust Fund specified in this Agreement, shall permit a
28

1 Trust Fund Auditor to review any and all records relevant to the enforcement of the provisions of
2 this Agreement pertaining to the Trust Funds.” Hagan Decl. ¶20.

3 Defendant maintained two separate accounts with the Laborers’ Trust Funds—account
4 number 35730-00, which covered all employees performing work covered by the Master
5 Agreement, and account number 80132-00, which covered the President, Controller and Office
6 Manager employed by Defendant and performing work covered by the Participation Agreement.
7 Defendant became delinquent in the payment of contributions under both accounts in the total
8 amount of \$38,590.71. Hagan Decl. ¶12 and Exhibit E.

9 Under the Master Agreement account, account number 35730-00, Defendant failed to pay
10 contributions for the months of September, October and November of 2009. During these months,
11 Defendant failed to remit any payments due along with the Employer Reports of Contributions
12 they submitted detailing the amounts owed by them. The total amount due and owing for
13 contributions not made during these months is \$16,758.80. Hagan Decl. ¶13 and Exhibit F.
14 Because these contributions were unpaid, the Trust Funds assessed liquidated damages and interest
15 in the amount of \$3,680.90 against Defendant. Hagan Decl. ¶13 and Exhibit G. Defendant also
16 made a number of delinquent payments to the Trust Funds on this account for hours they reported.
17 As a result, the Trust Funds assessed liquidated damages and interest for the months of July,
18 August, September, October, November, December of 2008 and May, June, July and August of
19 2009. The total amount of liquidated damages and interest assessed by the Trust Funds for these
20 delinquent payments totaled \$7,784.84. Hagan Decl. ¶14 and Exhibit H.

21 Under Defendant’s Special Plan III account for contributions on behalf of the President,
22 Controller and Office Manager, account number 80132-00, Defendant became delinquent in the
23 payment of contributions owed and also failed to pay contributions on particular months.
24 Specifically, for the months of July, August, September, October and November of 2009,
25 Defendant failed to remit any monthly payments due for the President of the company that
26 continued to be employed there. The total amount due and owing for these months is \$7,410.00.
27 Hagan Decl. ¶15 and Exhibit I. Because these contributions were unpaid, the Trust Funds assessed

1 liquidated damages and interest in the amount of \$2,306.10 against Defendant. Hagan Decl. ¶15
2 and Exhibit J.

3 The monthly contribution amounts due under the Special Plan for these months were
4 \$741.00 per month per person. Defendant had two employees reporting under the Special Plan,
5 and thus the monthly amount due was \$1,482.00. This rate was set by the Board of Trustees,
6 pursuant to their authority under the Trust Agreements and pursuant to the Participation
7 Agreement signed by Defendant, on February 1, 2009. Hagan Decl. ¶16 and Exhibit K.

8 Defendant also made a number of delinquent payments to the Trust Funds on the Special
9 Plan III account, account number 80132-00, for hours previously reported and paid late. As a
10 result, the Trust Funds assessed liquidated damages and interest for the months of August 2008 and
11 May and June of 2009. The total amount of liquidated damages and interest assessed by the Trust
12 Funds for these delinquent payments totaled \$650.07. Hagan Decl. ¶17 and Exhibit K.

13 Defendant has refused to pay the amounts owed. Hagan Decl. ¶18. Plaintiffs wish for
14 Defendant to submit to a complete audit to verify the amounts reported by Defendant and to
15 determine whether Defendant's employees performed covered work under the Collective
16 Bargaining Agreement for which additional contributions are owed to the Trust Funds.

17 Furthermore, Defendant owes attorneys' fees and costs, as the Agreements provide for the
18 recovery of attorneys' fees and costs in an action to recover contributions and enforce the terms of
19 the agreement. Hagan Decl. ¶19. The Trust Funds have incurred attorney's fees and costs in
20 bringing this action. The estimated total attorneys' fees is \$5,168.75, with costs of \$530.00.
21 Hagan Decl. ¶19 & Declaration of Concepción E. Lozano-Batista in Support of Motion for Default
22 Judgment ("Lozano Decl.") ¶¶11 & 12.

23 In light of Defendant's failure to pay the delinquent contributions owed, on November 17,
24 2010, the Trust Funds filed suit to obtain an injunction for an audit to allow the Trust Funds to
25 verify the amounts owed by Defendant and to seek delinquent contributions owed. Service on
26 Defendant was completed on November 29, 2010, but Defendant did not respond to the Complaint.
27 Consequently, at the request of the Plaintiffs, the Clerk entered default against Defendant on

December 30, 2010. Lozano Decl. ¶3.

IV. RELIEF REQUESTED.

The Trust Funds respectfully request that the Court enter a default judgment in favor of the Trust Funds in which it is ordered that: (1) Defendant pay the sum of \$24,168.80 in principal contributions owed to the Trust Funds; (2) Defendant pay the sum of \$14,421.91 in liquidated damages and interest owed to the Trust Funds; (3) Defendant be required to submit to an audit by Plaintiff Trust Funds; (4) Defendant pay the Plaintiffs' attorney's fees attorneys' fees in the amount of \$5,168.75, and costs of \$530.00; (5) an injunction is issued from this Court compelling Defendant to forthwith submit to an audit by auditors selected by the Trust Funds, covering the time period beginning January 1, 2007 to the present date, at premises of the Defendant, or location where the records are kept, during business hours, at a reasonable time or times, and to allow said auditors to examine and copy such books, records, papers, reports of Defendant relevant to the enforcement of the collective bargaining agreement or the Trust Agreements, including, but not limited to, the following:

Individual earning records (compensation); W-2 forms; 1096 and 1099 forms; reporting forms for all Trust Funds; State DE-3 tax reports; workers compensation insurance report; employee time cards; payroll journal; quarterly payroll tax returns (form 941); check register and supporting cash voucher; Form 1120- 1040 or partnership tax returns; general ledger - (portion relating to payroll audit);

(6) that an accounting be had between Plaintiffs and Defendant; and (7) that upon completion of the accounting, the Judgment entered by the Court that may be amended by the Plaintiffs to incorporate the outstanding sums ascertained from the audit to be due from Defendant, as well as liquidated damages and interest on said sums.

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. ISSUES TO BE DECIDED

The Court must decide the following issues:

1. Is Defendant liable under the Employee Retirement Income Security Act of 1974, as amended thereto ("ERISA"), 29 U.S.C. §1145 and/ or 29 U.S.C. §1002(21)(A), for unpaid

1 contributions in the amount of \$24,168.80, and liquidated damages and interest in the amount of
2 \$14,421.91?

3 2. Must the Court order Defendant to submit to an audit pursuant to the Trust
4 Agreements?

5 3. Are the Trust Funds entitled to attorneys' fees and costs related to this matter,
6 pursuant to the terms of the Agreements and ERISA section 502(g)(2)?

7 **B. ARGUMENT**

8 **1. Defendant owes delinquent contributions, as well as liquidated damages and**
9 **interest**

10 Defendant's failure to pay the delinquent contributions to the Laborers Trust Funds violates
11 ERISA §515, 29 U.S.C. Section 1145. ERISA Section 515 provides that:

12 Every employer who is obligated to make contributions to a multi-employer
13 plan under the terms of the plan or under the terms of a collectively
14 bargained agreement shall, to the extent not inconsistent with the law, make
15 such contributions in accordance with the terms and conditions of such plan
16 or such agreement.

17 Furthermore, where a collective bargaining agreement, as here, requires contributions on
18 behalf of employees who performed covered work, it will be enforced. See Agthos v. Starlite
19 Motel, 977 F.2d 1500 (3rd Cir. 1992); Benson v. Bowers Moving & Storage, Inc. 907 F.2d 310
20 (2nd Cir. 1990). Determinations of the amounts due under the collective bargaining agreement
21 requiring payments to third party beneficiary trust funds will be construed in favor of the funds.
22 See Irwin v. Carpenters Health and Welfare Trust Fund for California, 745 F.2d 553, 555-557
23 (9th Cir. 1984); Brick Masons Pension Trust v. Industrial Fence & Supply, Inc., 839 F.2d 1333
24 (9th Cir. 1988). In addition to the unpaid contributions, Plaintiffs are entitled to interest, liquidated
25 damages, expenses incurred in connection with delinquencies, and reasonable attorney's fees and
26 costs of the action pursuant to the Trust Agreements and ERISA. ERISA § 502(g)(2) provides:

27 In any action under this title by a fiduciary for or on behalf of a plan to
28 enforce §515 in which a judgment in favor of the plan is awarded, **the court**
shall award the plan –

(A) the unpaid contributions,

- 1 (B) interest on the unpaid contributions,
2 (C) an amount equal to the greater of
3 (i) interest on the unpaid contributions, or
4 (ii) liquidated damages provided for under the plan in an amount
5 not in excess of 20 percent [...]
6 (D) reasonable attorney's fees and costs of the action, to be paid by the
7 defendant, and
8 (E) such other legal or equitable relief as the court deems appropriate.
9 (emphasis added).

10 Furthermore, with respect to liquidated damages owed under collective bargaining
11 agreements, under federal common law, liquidated damages provisions, such as the one at hand,
12 are enforceable and not void as a penalty. Idaho Plumbers v. United Mechanical Contractors, 875
13 F.2d 212, 216 (9th Cir. 1989); United States v. Carter, 353 U.S. 210 (1957).

14 Defendant is bound to the collective bargaining agreement with the Northern California
15 Laborers District Council. The Master Agreement and Trust Agreements requires that Defendant
16 make the contributions at issue. Defendant's failure to pay the contributions, liquidated damages
17 and interest at issue is a breach of its collective bargaining agreement and a violation of ERISA
18 §515. Accordingly, judgment must be entered in favor of the Trust Funds.

19 **2. The Trust Funds Have A Right To Compel The Audit At Issue.**

20 The Master Agreement gives the Trust Funds the right to conduct an audit of Defendant's
21 books and records. Section 7 of the Master Agreement specifically provides that "Each Individual
22 Employer, upon request of any Trust Fund specified in this Agreement, shall permit a Trust Fund
23 Auditor to review any and all records relevant to the enforcement of the provisions of this
24 Agreement pertaining to the Trust Funds." Hagan Declaration, ¶16.

25 Where a collective bargaining agreement, as here, gives Trustees of an employee benefit
26 plan the right to audit an employer's books and records, it will be enforced. Central States
27 Southeast and Southwest Areas Pension Fund v. Central Transport Inc., 472 US 559 (1985) Reh'g
28 denied 473 U.S. 926 (1985); Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp, 920

1 F.2d 1491 (9th Cir. 1990), cert. denied, 501 U.S. 1232 (1991).

2 **3. The Laborers Trust Funds Are Entitled To Their Attorneys' Fees and costs.**

3 The governing Trust Agreements and Master Agreement (which is incorporated by
4 reference into the Collective Bargaining Agreement) provide that if an employer fails to abide by
5 the terms of the agreement with regard to fringe benefit payment and legal consultation is sought
6 by the Board of Trustees, reasonable attorneys' fees, court costs, and all other expenses incurred in
7 enforcing collection will be paid by the delinquent employer. Hagan Decl. ¶16. Because courts
8 generally award attorneys' fees based on such contractual authorization, Defendant should be
9 liable for the reasonable cost of attorneys' fees and costs incurred by the Trust Funds in seeking to
10 collect the delinquencies and compel the audit at issue. See Kemner v. District Council of Painting
11 and Allied Trades No. 36, 768 F.2d 1115, 1120 (9th Cir. 1985). Moreover, the Trust Funds are
12 entitled to a mandatory award of attorneys' fees under ERISA §502(g)(2).

13 Plaintiffs referred the matter to the Trust Funds' counsel for suit. A Declaration
14 documenting the time spent by the Trust Funds counsel is provided herewith. The total amount of
15 attorneys' fees and costs expected in this case are \$5,168.75 in fees, and costs of \$530.00.

16 **4. Default judgment is proper in this case, as Defendant has not appeared.**

17 Under Rule 55(b)(2) of the Federal Rules of Civil Procedures (F.R.C.P.), Default Judgment
18 is proper against a defendant who does not appear where the claim is for a sum certain or one that
19 can be made certain by computation. Combs v. Col & Mineral Mgmt. Serv., Inc., (Dist. Ct. DC
20 1984) 105 F.R.D 472, 474). Defendant was served with the First Amended Complaint on October
21 12, 2009. Defendant was timely served with the complaint, but failed to answer the complaint. On
22 December 30, 2010 the Clerk entered default against Defendant after Defendant failed to file a
23 responsive pleading.

24 Defendant promised to contribute and pay to Plaintiffs the hourly amounts required by said
25 Agreements for each hour paid for or worked by any of their employees who performed any work
26 covered by said Agreements, and that it would be subject to and bound by all of the terms,
27 provisions and conditions of the Trust Agreements as incorporated by the terms of the Master

1 Agreement, including audit entry. Pursuant to these Agreements, Plaintiffs' Motion for Default
2 Judgment requests entry of judgment in their favor for audit entry and attorneys' fees and costs.
3 Plaintiffs also request that the Court maintain jurisdiction over this action to enforce the Order
4 compelling an audit and payment of all amounts found due and owing. Accordingly, Plaintiffs
5 request that Judgment be entered in their favor according to the terms of the Agreements.

6 **C. CONCLUSION**

7 For the reasons stated above, Plaintiffs request that the Court enter judgment in their favor
8 requiring Defendant to pay delinquent contributions and liquidated damages and interest, submit to
9 an audit, and to pay Plaintiffs their attorneys' fees and costs.

10 Dated: March 8, 2011

11 WEINBERG, ROGER & ROSENFELD

12 A Professional Corporation

13 By: /s/ Concepción E. Lozano-Batista
14 CONCEPCIÓN E. LOZANO-BATISTA

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